In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. One of the issues to be resolved in this case is whether the second proviso in the Refuse Act of 1899, 33 U.S.C. 407, conditions enforcement of the general discharge prohibition in that statute on the establishment of a formal permit program. We have shown in our main brief (pp. 21–26) that neither the language nor the legislative history of the proviso suggests that the Secretary of the Army, in exercising his discretionary authority thereunder to permit certain discharges, is required to devise a regulatory scheme to make the broad anti-dumping provision operative. Respondent and *amici curiae* do not dispute this. Indeed, they have not even discussed the Act's second

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proviso in their briefs, but have argued instead, on the basis of other language in the Refuse Act, issues of statutory construction which are not now before the Court.

The principal contention of PICCO and the *amici* is that the language and legislative history of the Refuse Act indicate a congressional intent to prohibit only the discharge of refuse matter that would impede or injure navigation, without reaching deposits of industrial waste which have no significant adverse effect on navigation, such as the deposits involved in the present case. PICCO seeks, alternatively, to bring its discharges within the "sewage" exception to the statutory ban.

As we pointed out both in the certiorari petition (Pet. 5) and in our merits brief (Gov't Br. 5), these contentions were fully considered and rejected by the district court (Pet. App. 31a–32a) and by the court of appeals (Pet. App. 4a–6a). The remand order of the court below did not encompass either issue, but was for the sole purpose of giving "PICCO * * * the opportunity to prove the nonexistence of a permit program at the time of the alleged offenses" or, alternatively, to prove "that the Corps of Engineers affirmatively misled it into believing that a permit was not necessary in its situation" (Pet. App. 25a). Since no cross-petition for certiorari was filed by the respondent challenging the court of appeals' interpretation of the Refuse Act as covering PICCO's discharges of non-navigation-impeding industrial waste matter, the issues concerning the nature of the deposits involved here and their impact on navigation

are not before this Court. See *Brennan* v. *Arnheim and Neely, Inc.*, No. 71–1598, decided February 28, 1973, slip op. 4–5.[1]

Moreover, as shown in our main brief (pp. 15–17), the decisions of this Court in *United States* v. *Standard Oil Co.*, 384 U.S. 224, and in *United States* v. *Republic Steel Corp.*, 362 U.S. 482, strongly support the court of appeals' ruling that the Act prohibits the particular type of discharge flowing from PICCO's pipes. *Standard Oil* involved an accidental discharge of aviation gasoline, which the parties stipulated "was dissipated into the river," and which the trial court found "was not such as to impede navigation."[2] This non-navigation-impeding discharge, the Court held (384 U.S. at 228–229), was refuse matter, the unauthorized deposit of which was proscribed by the first clause of Section 13, irrespective of its value. "The word 'refuse'," it stated (384 U.S. at 230), "includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse."

While respondent argues that its discharges into the Monongahela River of industrial waste matter cannot properly be labelled "pollutants" (but see pp. 5–6, *infra*), it does not—and obviously cannot—suggest that

[1] If respondent had filed a cross-petition for certiorari, seeking review of these issues by this Court, a decision in its favor would have eliminated any need for a trial on the separate issues that are the subject of the court of appeals' remand order.

[2] Both the stipulation and the district court's unreported opinion in *Standard Oil* are contained in the printed appendix filed in that case, No. 291, October Term 1965, at pp. 5–7, 8–11.

the deposits contained no "foreign substances" (see Gov't Br., pp. 4–5). It seeks, instead, to come within the "sewage" exception in Section 13. The court of appeals explicitly rejected this contention, holding that "[a]s a matter of law, * * * liquid industrial waste flowing through pipes into navigable water is not exempt from the proscriptions of the Act" (Pet. App. 6a). This Court reached the same conclusion in rejecting a similar argument in *Republic Steel, supra*, 362 U.S. at 490–491.[3]

2. PICCO also apparently takes the position that, because it had obtained a State permit in 1956 (PICCO Br., Exh. 6, pp. 10a–12a) for discharging industrial waste into the Monongahela River from this plant, it was not obliged to seek further permission from federal authorities (PICCO Br. 19, 26). No citation is offered in support of this proposition, and nothing in the Refuse Act confers any such exemption from its coverage. Moreover, Congress provided in the Water Quality Improvement Act of 1970, 33 U.S.C. (1970 ed.) 1171(b)(1), that the obtaining of a state permit is but a necessary first step to securing permission from the Secretary of the Army to discharge refuse matter under the 1899 Act.[4] As the district court pointed out below (Pet. App. 38a):

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[3] And see Gov't Br. 17, n. 14.

[4] Respondent and *amici* argue that the 1970 legislation calling upon states to establish water quality standards is irreconcilable with the Refuse Act ban on all unauthorized discharges of refuse matter into navigable waters. But, as the court of appeals pointed out (Pet. App. 8a), the two statutes "were designed to accomplish what may be viewed as the same end by different means." Congress made it abundantly clear that the later legislation was not to be construed as supplant-

> * * * the [Water Quality Improvement] Act requires, by § 1171(b)(1), that any applicant for a Federal permit to engage in an activity "which may result in any discharge into the navigable waters of the United States" shall provide the permitting authorities with certification from the state water pollution control agency that there is reasonable assurance that such discharge will not violate the applicable water quality standards.

It is, of course, irrelevant for present purposes whether PICCO could have gotten a federal permit for its discharges on the basis of its 1956 state permit, as it contends, since it never filed an application with the Secretary. We point out, however, that the state permit on which respondent relies was issued

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ing the 1899 Act (33 U.S.C. 1174), and, in addition, provided that the Secretary of the Army, in exercising his discretionary authority under the earlier statute, was not to ignore the water quality standards prescribed in the subsequent amendments to the Federal Water Pollution Control Act (33 U.S.C. 1171(b)(1)). Accordingly, as we have shown in our main brief (Gov't Br. 19–21, 26–27), the two statutes work together to prevent deposits into our Nation's navigable waters of foreign effluents having an impermissibly high waste content, that is, a waste content that would, under existing state and federal water standards, cause ecological injury or a danger to health or safety.

This objective will in the future be accomplished for the most part under a single statute, the recently enacted Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816. That statute, however, by its terms has no effect on pending actions under the Refuse Act (Sec. 4 (a), 86 Stat. 896). And see Gov't Br. 13, n. 7. Moreover, the Refuse Act prohibition against non-navigation-impeding discharges continues to have vitality with respect to refuse matter deposited into navigable waters from other than a "point source" (*i.e.*, a pipe, ditch, or other conduit), which is the principal concern of the 1972 Amendments (Sec. 502(14), 86 Stat. 887).

more than ten years *before* Pennsylvania's federally-approved water quality standards were adopted on June 28, 1967 (40 C.F.R. 120.10). Thus, notwithstanding the 1956 permit, PICCO would need a later Pennsylvania permit certifying that its effluents met the 1967 state standards before the Secretary would even consider permitting the company to deposit its waste matter into the Monongahela River.[5] Even then, as the district court observed (Pet. App. 39a), other considerations "including the impact on fish and wildlife and the risk to health or safety," might have prompted the Secretary to withhold permission. That, however, is open to conjecture on this record, since the federal authorities were not given any opportunity to consider the matter.

3. Finally, with respect to respondent's due process argument, we have set forth in our main brief (pp. 34–39) why we believe that PICCO is in no position to claim it was affirmatively misled by the issuing authorities not to seek a discharge permit.

We there show that the Corps of Engineers changed its policy with respect to water pollution control in

[5] Respondent's offer of proof included no state permit indicating that the discharges from this plant satisfied the 1967 state standards (App. 166–169). Indeed, PICCO acknowledges (PICCO Br. 19, n. 9) that "to meet the new State standards, which would have become the new federal standards, by the end of 1974 * * *," it was at the time of trial "in the process of constructing a $300,000.00 new water treatment facility * * *."

1968, as manifested both in its new regulations[6] and in its public announcements.[7] PICCO's continued reliance on the pre-1968 policy of the Corps as grounds for not seeking permission from federal authorities in 1970 to discharge its industrial waste matter is thus to no avail.[8] Moreover, the company was specifically advised by the Corps in November 1970 that its discharges were "unlawful" and required "a permit issued by the Department of the Army under the Refuse Act, 33 U.S.C. 407" (App. 170). Yet it continued for at least another five months to deposit its waste matter into the Monongahela River without

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[6] While respondent and *amici* suggest that subsection 209.200(e)(2) of the new 1968 regulations raises some question of the Corps' concern for matters of pollution, we have already pointed out (Gov't Br. 35, n. 35) that that particular subsection is concerned only with designated dumping grounds within navigable waters, and does not purport to deal with Section 13 permits in the context of the type of discharges involved here.

[7] The announcement by the Corps of Engineers on July 30, 1970, is misprinted as it appears in the appendix to our main brief (p. 45), and we have therefore reproduced it in corrected form *infra*, at pp. 11–12.

[8] Respondent refers to a number of other federal permits it has obtained in past years (PICCO Br. 18–19). Those permits, however, essentially pertain to construction projects undertaken by the company, which did not involve discharges of any kind into the river. It is, therefore, not at all surprising, as respondent seems to suggest, that the Corps made no mention of a Section 13 permit in passing on the company's applications for the other federal permits.

applying for a federal permit;[9] the present criminal information was returned in April 1971 (see Gov't. Br. 38, n. 37).[10]

In these circumstances, there is no sound reason to excuse PICCO's failure to seek federal approval for depositing its industrial waste into the river on the ground that it had been "affirmatively misled" by the Corps of Engineers to believe that its activity was lawful (and see Gov't. Br. 38, n. 38).

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[9] It is undisputed that the Secretary, had he received a request from PICCO for permission to discharge, would have considered it, just as he considered similar requests from other companies made in November 1970 (Gov't. Br. 33).

[10] It is suggested by *amicus* Jones & Laughlin Steel Corporation (J&L Br. 32–33) that institution of the present action conflicts with the Department of Justice's guidelines advising United States Attorneys as to which criminal and civil suits they could institute under the Refuse Act "on their own authority." See *Justice Department Guidelines for Litigation Under the Refuse Act*, 1970 BNA Environment Reporter, 288–290. The case at bar, however, was not brought by the United States Attorney on his own authority. Rather, the action was authorized by the Department of Justice after consultation with, and independent investigation by, the Environmental Protection Agency. PICCO is one of several companies having an industrial plant on the banks of the Monongahela River. The discharges from its plant were among the heaviest on the river. Notwithstanding notification that its conduct was unlawful without a federal permit, PICCO continued to deposit its waste matter into the Monongahela; it did not seek permission to do so from federal authorities. The present action, therefore, was within the contemplation of the Department's policy in this area "to use [the Refuse Act] to supplement [the Water Pollution Control] Act by bringing appropriate actions * * * to punish the * * * recalcitrant pollutor * * *" (J&L Br. 33).

CONCLUSION

For the reasons stated herein and in our main brief, the judgment of the court of appeals should be reversed and the judgment of conviction should be reinstated.

Respectfully submitted.

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Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
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MARCH 1973.

APPENDIX

NEWS RELEASE

DEPARTMENT OF THE ARMY,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, D.C. 20314.

For immediate release, July 30, 1970

CORPS OF ENGINEERS ANNOUNCES NEW PERMIT REQUIREMENTS

The Corps of Engineers today announced new permit requirements under the Refuse Act (33 U.S.C. 407) concerning all discharges into navigable waters. Permits will be required for all industrial discharges into navigable waters and their tributaries. New permits will be required where existing permits were granted without adequate consideration of the quality of the effluent. Permits will also be required for current discharges into navigable waters where no permits have been granted.

Applicants for new permits are now required to identify the character of the effluent and to furnish pertinent data such as chemical content, water temperature differentials, toxins, sewage, quantity of solids involved and the amount and frequency of discharge.

The Corps' revised requirements are in compliance with the Environmental Policy Act of 1969 which requires agencies to consider environmental impact in

the administration of public laws, and with the Water Quality Improvement Act of 1970 which requires applicants for Federal permits to file a certification from the appropriate State that the discharge "will not violate applicable water quality standards." Under the revised procedures, the effects of discharges on water quality will be considered in processing the permit.

While permits will be required for all future discharges into navigable waters and their tributaries, the Corps of Engineers will initially concentrate on major sources of industrial pollution not covered by existing permits. The Corps hopes that through widespread knowledge of its new permit requirements, including State certification, it will, along with other Federal, State, and local anti-pollution activities, encourage industries to accelerate their own anti-pollution efforts.

All actions under the Refuse Act having Water Quality implications are being closely coordinated with the Federal Water Quality Administration to insure unity in the Federal Water anti-pollution program.

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